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No. 92-535

FILED
OCT 26 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

Charles William O'Brien

(F & S Properties),
(WKH Corporation),
(HWK Corporation),
(HKW Properties),
(Jasper Investment Corporation),

Petitioner,

vs.

Bank One, Columbus, N.A.,

Respondent.

Petition For A Writ Of Certiorari To
The Supreme Court
Of The
State Of Ohio

Brief Of Respondent

Michael W. Donaldson
Counsel for Respondent
VORYS, SATER, SEYMOUR AND PEASE
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6315

October, 1992

BEST AVAILABLE COPY

QUESTIONS PRESENTED BY PETITIONER FOR REVIEW

1. Whether the Ohio Civil Rule 3(A) commencement requirement that service be obtained within one year of filing in order to properly commence an action is extended by the filing of an Amended Complaint and, thus, accords due process.

2. Whether refusal to mail court filings and/or refusal to re-mail court filings by ordinary mail after certified mailing of such filings have been returned to opposing counsel as "unclaimed," constitutes notice of such filings sufficient to accord the affected party due proces.

THE PARTIES

The parties are Petitioner, Charles William O'Brien and Bank One, Columbus, N.A. (its parent company is Banc One Corporation and its only non-wholly owned subsidiary is Banc One Compensation Services Corporation).

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OPINIONS DELIVERED IN THE CASE

Petitioner incorrectly refers to the 10th District Court of Appeals of Ohio. The Court's proper name is the Court of Appeals of Ohio, Tenth Appellate District, as noted on its Opinion. Petitioner's Appendix A-2.

JURISDICTION

Petitioner incorrectly refers to 28 U.S.C., Section 1257(3). Presumably, Petitioner intended 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Petitioner incorrectly refers to Ohio Civil Rule 5(A) because it is not a constitutional provision.

STATEMENT OF THE CASE

A. Facts Material to the Consideration of the Questions Presented.

Petitioner fails in his Petition to follow Rule 14.1(g) of this Court which mandates a *concise* statement of facts *material* to the consideration of the questions presented. Respondent, pursuant to Rule 15.1 of this Court, will address "perceived misstatements of fact or law" by Petitioner and will include material facts omitted by Petitioner.

The first note was executed in 1980 not 1990. Respondent did not "unilaterally" attach property descriptions to Mortgage Deeds after they were signed or "without the consent,

permission or knowledge" of Petitioner. Said descriptions were attached to the Mortgage Deeds with the consent of Petitioner. The Trial Court record contains only Respondent's substantive evidence on this and all of the following matters because Petitioner failed, despite numerous Court orders, to provide discovery. See Court of Appeals Opinion, Appendix A-6 through A-12 to Petition.

In June, 1982, Petitioner requested and was provided with a second set of releases because he stated that he had not received the first set. Further, both sets of releases listed only the one property. Petitioner kept one set of releases and in January, 1987, filed and recorded them containing after the legal description "and all other premises set forth on Schedule A attached hereto." Schedule A contained the legal descriptions of all the mortgaged properties.

The transfers of the mortgaged properties in late 1986 by Petitioner were made without the knowledge or consent of Respondent. Similarly, the filing and recording of the releases in January, 1987, were made without the knowledge or consent of Respondent.

Respondent never accepted checks representing payments in full. Respondent followed its general policy of applying all payments to the oldest obligation first.

The first *material* fact is that Respondent did file for and obtain judgment on the three cognovit notes on March 17, 1989. Service was obtained on Petitioner who filed a motion for relief from judgment on April 5, 1989. Respondent ran title, discovered the December, 1986, transfers to the five entities of Petitioner, the January, 1987, releases and the subsequent mortgages to other lenders. On June 7, 1989, with leave of Court Respondent's Amended Complaint was deemed filed.

Respondent's service attempts for the Amended Complaint were delayed by Petitioner's affidavit of prejudice against the trial judge, interlocutory appeals, February 27, 1990, Petition for Writ of Certiorari to this Court and requested stay of proceedings pending appeals. Between April 9, 1990, and May 8, 1990, Respondent obtained service on three of Petitioner's corporate defendants. When Respondent filed for service by publication on the remaining three defendants, Petitioner faxed his May 11, 1990, threatening letter. See copy attached hereto as Appendix A-1 through A-3. Petitioner filed a second affidavit of prejudice on June 4, 1990, and the trial judge recused herself. On June 22, 1990, Respondent moved for leave to file its Second Amended Complaint. On September 5, 1990, leave to file was granted, and filing occurred on September 6, 1990, with a request for service by publication on the three defendants remaining to be served.

The second trial judge on September 12, 1990, scheduled a pretrial and motions' hearing for September 21, 1990. Respondent began service of pleadings on Petitioner by certified mail after Petitioner claimed not to have received a major package of motions mailed on September 17, 1990. On September 18, 1990, Petitioner filed his third affidavit of prejudice. On September 20, 1990, the Supreme Court of Ohio denied the third affidavit of prejudice and Petitioner filed his Notice of Removal to Federal Court. On September 25, 1990, Respondent filed its motion to remand. On November 19, 1990, the three defendants served by publication requested from the Federal Court extensions of time to move or plead.

On December 5, 1990, the case was remanded. See Court of Appeals Opinion, Appendix A-30 and A-31 to Petition. On December 10, 1990, Petitioner filed an appeal of the remand. On December 21, 1990, Petitioner filed his fourth affidavit of

prejudice--this one against the federal judge. On December 31, 1990, Petitioner filed a Complaint in Federal Court against the Ohio trial judge, counsel for Respondent, the Chief Justice of the Supreme Court of Ohio and several others.

At a January 4, 1991, hearing, the trial judge instructed service of all filings upon Petitioner by regular mail and Respondent complied. On January 17, 1991, Petitioner filed his fifth affidavit of prejudice--the second against the second trial judge. On February 7, 1991, Respondent was granted a default judgment against Petitioner for his failure with respect to discovery.

Petitioner incorrectly states at page 10 of his Petition that the Court of Appeals' decision was rendered on December 17, 1991, when it was actually rendered on December 31, 1991. Further, Petitioner incorrectly states at page 11 of his Petition that "as a direct result of the failure to receive the various pleadings in the case, Charles William O'Brien was defaulted for his alleged failure to comply with discovery orders predicated upon *unserved filings*." Petitioner was ordered on May 18, 1990, July 27, 1990, January 18, 1991, and January 30, 1991, to provide complete and non-evasive answers to Respondent's eight interrogatories. On February 6, 1991, Petitioner faxed a single page response objecting to the first question as to his wife's address and denying any knowledge on the other questions related to his entities. See Court of Appeals Opinion, Appendix A-5 through A-12 to Petition. None of these orders or motions requesting them were filed during the certified mail period from September 17, 1990, to January 4, 1991, during which time Petitioner still received at his address copies of all filings addressed to his wife and two of his non-corporate entities, and the counsel for his three corporate entities also received copies.

B. State in the Proceedings Where Federal Questions Were Raised.

Petitioner has failed under Rule 14.1(h) of this Court by not specifying the stage in the proceedings, both in the Trial Court and in the Appellate Court, at which the federal questions sought to be reviewed were raised; the method and manner of doing so and the way in which those Courts ruled; and pertinent quotations to show that the federal questions were timely and properly raised as to give this Court jurisdiction to review the judgment on a writ of certiorari.

REASONS WHY THE CASE SHOULD NOT BE REVIEWED BY THIS COURT

Pursuant to Rule 15.2 of this Court, Respondent submits that this Court should not review this case because of the blatant misstatement of facts and omissions of material facts by Petitioner. Additionally, Petitioner fails to comply with Rule 14.1(h) of this Court requiring him to show that any federal questions were timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

Further, Petitioner fails under Rule 14.1(j) to include in his Petition a direct and concise argument of the reasons to allow the writ with reference to Rule 10. Petitioner further fails under Rule 10 of this Court to articulate any "special and important reasons" to grant the Petition. Petitioner fails under Rule 10.1(b) to show in the instant case that the Supreme Court of Ohio has decided a federal question in a way that conflicts with the decision of another state Court of last resort or of a United States Court of Appeals. Petitioner also fails under Rule 10.1(c) to show that the Ohio state Court in the instant case decided an important question of federal law which has not been, but should

be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Petitioner has had his one appeal as a matter of right by the Court of Appeals of Ohio, Tenth Appellate District. Petitioner has supplied no reason to either the Supreme Court of Ohio or to this Court to grant a discretionary review. Petitioner's argument set forth on pages 12 through 39 (which exceeds the 30-page limit established by Rule 33 of this Court) merely rehashes the argument made to and rejected by the Ohio Court of Appeals.

Petitioner misstates the Ohio law applicable to the instant case. Rule 3(A) of the Ohio Rules of Civil Procedure ("Civ. R.") until July 1, 1991, provided that a "civil action is commenced by filing a Complaint with the Court, if service is obtained within one year from such filing." Petitioner at page 12 of his Petition misstates Civ.R. 3(A) as a one-year service requirement. Petitioner then misapplies at pages 14 and 15 of his Petition the decision by the Supreme Court of Ohio in *Mayhew v. Yova* (1984), 11 Ohio St. 3d 154, which he characterizes to be that a defendant not served within one year had no obligation to plead within the year and failure to do so does not waive the defense of lack of personal jurisdiction. In *Mayhew*, the Complaint was filed on November 6, 1980. Service was *never* obtained. Defendant moved to dismiss on December 1, 1981, asserting that the action was barred by the two-year statute of limitations. The motion was granted and both the Court of Appeals and the Supreme Court of Ohio affirmed. The plaintiff in *Mayhew* never moved for leave to file an amended or a second amended complaint as Respondent did in the instant case. Also, all defendants were served in the instant case whereas the defendant was *never* served in *Mayhew*. Finally, the statute of limitations ran in *Mayhew* but did not in the instant case.

Contrary to the argument by Petitioner on page 16 of his Petition, his wife and his entities were not on solid ground until the Court of Appeals Opinion on December 17[31], 1991, because there had not been a string of related cases [*Mayhew*] decided by the Supreme Court of Ohio [no citations] supporting their position, and Respondent had not been dilatory in light of Petitioner's concealment of the transfers, concealment of the additional mortgages, affidavit of prejudice, interlocutory appeal, Petition for Writ of Certiorari to this Court, requested stay of proceedings pending appeals and failure to respond to discovery--all within one year of the filing of the Complaint in the instant case.

The nub of Petitioner's argument on pages 16 and 17 of his Petition is that the decision in *Goolsby v. Anderson Concrete Corp.* (1991), 61 Ohio St. 3d 549, "sets an inappropriate standard for service in Ohio as adopted by the Appellate decisions in this case and, consequential denial of due process." Once again, Petitioner misstates the law of Ohio established in *Goolsby*.

In *Goolsby*, the Supreme Court of Ohio recognized that *had* the plaintiff "dismissed her complaint and again filed it at the time instructions for service were given, the action would have been commenced according to Civ.R. 3(A). We believe under these circumstances, the Civil Rules should not require a plaintiff to refile a complaint identical to one which has previously been, and remains, filed. Such an exercise could not be said to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice. Civ.R. 1(B). Consequently, we hold that when service has not been obtained within one year of filing a complaint, and the subsequent refiling of an identical complaint within rule would provide an additional year within which to

obtain service and commence an action under Civ.R. 3(A), an instruction to the clerk to attempt service on the complaint will be equivalent to a refiling of the complaint." *Goolsby*, 61 Ohio St. 3d 549, 550-551.

Further, Petitioner at page 25 of his Petition improperly implies that the Supreme Court of Ohio held in *Saunders v. Choi* (1984), 12 Ohio St. 3d 247, that Civ.R. 3(A) is an absolute rule requiring dismissal if service is not obtained within one year of filing. Petitioner also states on page 26 of his Petition that "*Saunders* is still the prevailing view." Petitioner's error is that he only implies from *Saunders* the statement that "since appellant failed to obtain service of process within the time period allotted in Civ.R. 3(A)... appellant's action must fail." *Saunders*, 12 Ohio St. 3d at 250. What Petitioner omits from *Saunders* is the rationale for the statement which *is* the fact that in *Saunders* the plaintiff under the savings statute only had a one year statute of limitation within which to commence her action under Civ.R. 3(A) and, when she failed to obtain service within that one year, her action failed.

No such one year statute of limitation operated in the instant case to require service within one year of filing. Accordingly, Petitioner's failure to understand the holding in *Saunders* and the longstanding basic principles recognized in *Goolsby* caused Petitioner to rely on his own technical interpretation of the law to his detriment and to the detriment of his wife and entities to the extent he so advised them.

Petitioner on page 29 of his Petition misstates the fact that personal jurisdiction was not obtained over his wife. In fact, the Trial Court deemed the Amended Complaint filed on June 7, 1989. Petitioner's three corporate entities were served within one year under Civ.R. 3(A) between April 9, 1990, and May 8, 1990, and were thereafter represented by counsel. The Trial

Court granted leave on September 5, 1990, and Respondent filed its Second Amended Complaint on September 6, 1990, with a request for service by publication on Petitioner's wife and two non-corporate entities. Service by publication was completed and just before their answer date, the three defendants on November 19, 1990, requested from the Federal Court extensions of time to move or plead, thereby acknowledging service on them. Petitioner, his wife and all five entities had been served with the summons and the Second Amended Complaint well before the February, 1991, judgment was granted.

On pages 31 through 37 of his Petition, the Petitioner misstates the facts and the law with respect to the certified mailing of filings to him. Respondent began such mailings after Petitioner claimed not to have received a voluminous package of motions mailed to him by Respondent on September 17, 1990.

Although Petitioner is correct in stating on page 35 of his Petition that service *may* be made by ordinary mail, he missstates on page 35 of his Petition that service *must* be by ordinary mail. Petitioner further misstates on page 36 of his Petition that Respondent "intentionally continued certified mailings" to deprive him of "his rights to due process." Respondent wanted to insure Petitioner's rights of due process by having proof that Petitioner received all filings. All Petitioner had to do was sign for and accept the certified mail -- he chose not to do so. Petitioner also omits to mention that copies of all filings were sent by regular mail to his wife, his two non-corporate entities and counsel for his three corporate entities.

Despite these regular mailings Petitioner misstates on page 37 of his Petition that he was denied the filings upon which his absence of response was construed as grounds for default judgment where he had no duty or ability to respond to unserved

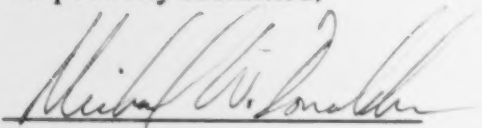
filings. As already noted herein, Petitioner was ordered on May 18, 1990, July 27, 1990, January 18, 1991, and January 30, 1991, to provide complete and non-evasive answers to Respondent's eight interrogatories. On February 6, 1991, Petitioner faxed a single page response objecting to the first question as to his wife's address and denying any knowledge on the other questions related to his entities. See Court of Appeals Opinion, Appendix A-5 through A-12 to Petition. None of these orders or motions requesting them were filed during the certified mail period from September 17, 1990, to January 4, 1991.

Finally, Petitioner misstates on page 37 of his Petition the 1975 unreported opinion. As noted on Appendix A-43 to the Petition, "notice of a hearing for summary judgment" was required to be sent out by regular mail after certified mail was unclaimed or refused. No such notice of a hearing for summary judgment was involved in the instant case.

CONCLUSION

For all of the foregoing reasons, Respondent asserts that the instant case should not be reviewed by this Court.

Respectfully submitted,



Michael W. Donaldson
P.O. Box 1008
Columbus, Ohio 43216
(614) 464-6315
Counsel for the Respondent

Certificate of Service

The undersigned counsel for respondent hereby certifies that three copies of this Brief of Respondent were served by regular U.S. Mail, postage prepaid, this 26th day of October, 1992, upon the following persons:

Gina M. Dougherty, Esq.
336 S. High Stret
Columbus, Ohio 43215

Counsel for Petitioner

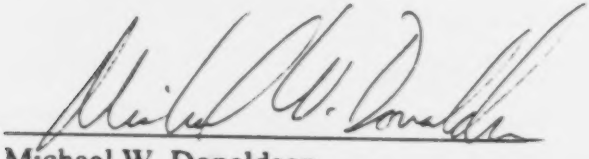
Nelson F. Genshaft, Esq.
Schwartz, Kelm, Warren & Rubenstein
41 South High Street
Columbus, Ohio 43215

Counsel for Freedom Federal Savings and Loan

and

Thomas R. McGrath, Esq.
McGrath, Kaufman, Hatcher
175 South Third Street
Suite 1070
Coiumbus, Ohio 43215

Counsel for Merit Savings and Lyndon Guaranty Bank of Ohio



Michael W. Donaldson

NATIONAL HERITAGE

Post Office Box 8369
Columbus, Ohio 43201
614-291-8787

May 11, 1990

James Hedden, Esq.
VORYS, SATER, SEYMOUR & PEASE
52 East Gay Street
Columbus, Ohio 43216
Via Fax #464-6350

Re: Bank One, Columbus, N.A.
vs. Charles William O'Brien, et al.
Case #89CV 03 1790

Dear James:

As I recall, at the status conference before Judge Stratton on May 9, 1990, you indicated that service on Karen Sue O'Brien, F&S Properties and the HKW Corporation would commence by publication, in spite of the expiration of the one year prerequisite therefore.

Please be advised that pursuant to Civil Rules 3, 4 and applicable Ohio case law, such service or attempt therefore is inherently futile and vests no jurisdiction whatsoever upon the Court. As such, should you, Bank One or Vorys continue to pursue such service, which will seriously damage the credit and reputation of all O'Brien-related entities and personnel, I shall

seek substantial redress and other relief predicated to reconcile such acts against you personally, Bank One, its officers, directors and John B. McCoy, Vorys and The Daily Reporter.

This letter is to place all recipients thereof on notice that upon the commencement of such service by publication, immediate redress shall be filed with the Court. Accordingly, I would give the matter serious consideration before the problems that already present a serious downside risk to the interests of Bank One become much more serious and widespread for the aforementioned entities.

Sincerely,

C.W. O'Brien

CWO:vcf

cc: Arthur Vorys
Via Fax #464-6350

John B. McCoy
Via Fax #248-5424

The Daily Reporter
c/o Dan Schillingburg
Fax #224-8649